APPENDIX A

THE OPINIONS BELOW

Opinion of the Court of Appeals of Maryland.

(Filed May 13, 1960)

No. 193, September Term, 1960

Ellis Gadol and Selma Gadol, co-partners doing business as Four Corners Pharmacy,

v.

Dart Drug Corporation of Maryland and Peoples Service Drug Stores, Inc.

Brune, C. J.:

In this Fair Trade Act case the complainants-appellants, Ellis and Selma Gadol, are the proprietors of the Four Corners Pharmacy, which is on the outskirts of Silver Spring in Montgomery County, and the respondents-appellees, Dart Drug Corporation of Maryland (Dart) and Peoples Service Drug Stores, Inc. (Peoples), each own and operate another drugstore in the vicinity. Silver Spring is in the area which is suburban to Washington, D. C., and there is no Fair Trade Act in the District of Columbia. Dart owns one other drugstore, at Bethesda, also in the Washington suburban area. Peoples' store in direct competition with the Gadols is one of a chain of drugstores operating in and around Washington. The Gadols brought this suit in the Circuit Court for Montgomery County for injunctive relief, both

temporay and permanent, to restrain Dart and Peoples from advertising and selling the products of four named manufacturers at less than the minimum retail resale prices fixed by those manufacturers under the Maryland Fair Trade Act (Code (1957), Art 83, § § 102-110, the "Fair Trade Act" or the "Act"). An interlocutory injunction was issued by the late Judge Reeves on July 28, 1958. Following a hearing more than a year later, an order dissolving the interlocutory injunction, dismissing the bill and thereby denying a permanent injunction, was entered by Judge Pugh on November 12, 1959. The Gadols appeal from that order.

This appeal turns upon whether or not there has been reasonable diligence on the part of the manufacturers to enforce adherence to their Fair Trade prices. Judge Pugh held that there had not been, and he dismissed the bill. There was no denial—on the contrary it was admitted—that the respondents had advertised and made sales at less than the manufacturers' Fair Trade prices. The defense was that the complainants were barred by lack of diligence of the four manufacturers in enforcing compliance with such prices, and hence that no valid Fair Trade prices were in existence, and action against these respondents is claimed to be discriminatory.

The four manufacturers whose products are involved are Johnson & Johnson, Bristol-Myers Company, Mead-Johnson Company, and Miles Laboratories, Inc. Each of them has taken appropriate steps to establish Fair Trade prices, and there seems to be no question that each has given adequate notice to the trade of those prices and of changes from time to time made therein. Their respective usual Fair Trade enforcement procedures and policies, as shown by the evidence, may be summarized as follows:

Johnson & Johnson. Notice of violations is received from their own salesmen, competitors, a local pharmaceu-

tical association or a Fair Trade Service Bureau. Upon receipt of a complaint, a salesman will call upon the alleged violator and request that he raise his prices to the established minimum. If this fails, a letter is sent to the violator from the company's home offices. Thereafter a salesman will follow up the letter to see whether compliance has been obtained. Professional shoppers are sometimes employed. If compliance is not obtained, the company's counsel sends a registered letter to the violator. If all of these efforts fail, counsel would be employed to bring suit, but suit would be brought only if negotiations failed.

Bristol-Myers Company. Violations are reported by salesmen or competitors. Violators are notified by registered letter, and this is followed up by a visit from a salesman. If compliance is not obtained, a professional shopper makes three separate shoppings; and if violations still continue, the evidence is turned over to local counsel with instructions to sue.

Mead-Johnson Company. Violations are reported by salesmen and competitors. Salesmen are instructed to watch advertisements in newspapers. After a violation is reported a warning letter is sent to the alleged violator and shoppings are made to check compliance. If compliance is not obtained, a second warning letter is sent; and if this is ineffective the matter is referred to the home office.

Miles Laboratories, Inc. Notice of violation is received from salesmen or competitors, and a letter is written to the alleged violator. If there is no correction, a visit by a salesman or by counsel, who is also an assistant secretary of the company, follows. If violations continued, suit would be filed.

The implementation of the manufacturers' procedures and policies in Maryland in general and in the Washington suburban area in particular may be thus summarized:

Johnson & Johnson. Ten instances were cited where the above procedures resulted in compliance. No suits had to be brought. The situation in Maryland was complicated by the giving of trading stamps by a number of dealers. Johnson & Johnson amended their contracts and prices to meet this by permitting a 3% merchandising allowance. Action had been deferred on this matter pending decision in the case of *Dart Drug Corp.* v. *Lilly*, 216 Md. 20, 139 A. 2d 272 (decided March 3, 1958). Johnson & Johnson has had no problem with Drug Mart, another dealer in the Washington suburban area, since July, 1958. Dart and Peoples were visited several times and Johnson & Johnson was on the point of suing Dart when this suit was filed.

Bristol-Myers Company. Testimony as to this company was limited to the year 1958 and thereafter. In 1958 the Company was notified of violations by Dart and Peoples and perhaps by one or two others. In September, 1958, Bristol-Myers had sixty-four retail outlets shopped for five of its products, and ten violations were reported. Seven were thought to have been inadvertent; all of these violations were corrected within two weeks as a result of salesmen's visits. At the time of the trial in November, 1959, a staff attorney for Bristol-Myers testified that since an investigation of the Company's enforcement policy in 1958 his Company had notice of only six violators. Three violators in Maryland, two of them in the Washington suburban area, were reported in the six months preceding the trial. Two of the three offenders ceased violations promptly after notification. The case against the third was turned over to Maryland counsel for action and suit was filed in September, 1959. Bristol-Myers has probably several thousand outlets in Maryland. It had contemplated suit against Dart and Peoples when this suit was brought.

Mead-Johnson Company. Suit was brought by Mead-Johnson in the United States District Court for the Dis-

trict of Maryland against Dart. The case did not come to trial because of the pendency of another case involving several questions, among them the effect of giving trading stamps. This other suit was originally filed in the Federal Court but was refiled in a State Court in Baltimore. The plaintiff drug manufacturer in that case is not one of the four manufacturers whose products are involved here. In several instances, compliance has been obtained without litigation. One such instance involved a People Drug store at College Park, in Prince Georges County.

Miles Laboratories. Suits were brought by this corporation in the Federal Court at Baltimore against Dart and Peoples in December, 1957. They have not come to trial and have been held under a stay order for the same reason that the Mead-Johnson suit against Dart has not yet come up.

About two weeks after the determination of the instant suit in the Circuit Court for Montgomery County Johnson & Johnson brought suit against Dart in the Federal Court at Baltimore, and on January 19, 1960, Judge Watkins filed an opinion holding that the plaintiff was entitled to a preliminary injunction. See The Daily Record (Baltimore), January 29, 1960. Judge Watkins was, of course, informed of Judge Pugh's decision in the instant case. He accepted it (unless reversed by this Court) as a binding determination that as of November 10, 1959, Johnson & Johnson's enforcement of its Fair Trade prices had not been sufficiently diligent, but he found that as of the time of the hearing before him on January 18, 1960, it was sufficiently diligent. He noted various actions taken by Johnson & Johnson during the interim to enforce compliance, including (but not in this exact order): (i) demands made upon Dart; (ii) meetings of Johnson & Johnson's local representatives, at which they were instructed to call upon the trade and give notice of Johnson & Johnson's intention to enforce Fair Trade prices, and

were also instructed to increase thier efforts to detect violations; (iii) the sending of notices to some 1425 known retailers in Maryland; (iv) the employment of a detective agency as shoppers to check up on possible violations; (v) a conference with the Prince Georges-Montgomery Pharmaceutical Association; (vi) a conference with the executive vice president of Peoples. At this last conference Peoples indicated a preference for Fair Trade and a willingness to comply, if competitors were prevented from price cutting. Johnson & Johnson had also sued a dealer at Dundalk (in the Baltimore suburban area), and on the day of the hearing expressed its intention to sue another in Montgomery County. This suit was filed the next day, the date of Judge Watkins' opinion.

Judge Watkins' opinion also pointed out that five Fair Trade cases on the docket of the Federal Court had been temporarily stayed, with the right to any party to request the Court to lift the stay at any time, pending the determination of similar cases in the Courts of Baltimore City, particularly cases involving questions arising from the giving of trading stamps or cash register receipts.

Of course, the evidence of the above recent activity by Johnson & Johnson was not before Judge Pugh and cannot affect our decision as to whether or not his order here involved should be affirmed or reversed. It does point up the fact that more could have been done by Johnson & Johnson and by the other three manufacturers than was done; but that is not determinative of the case. The question is whether enough has been done, that is, whether or not there has been reasonable diligence by the manufacturers in the enforcement of their Fair Trade prices. *Hutzler Bros. Co.* v. *Remington Putnam*, 186 Md. 210, 46 A. 2d 101; *Dart Drug Corp.* v. *Lilly, supra*, 216 Md. 20, 139 A. 2d 272; *General Electric Co.* v. *Home Utilities Co.*, 131 F. Supp. 838 (D.C., Md.), affd. 227 F. 2d 384 (C.A., 4th).

The respondents rely heavily on voluminous newspaper advertisements by the drugstores and other stores in the Maryland area suburban to Washington offering products of the four manufacturers at less than Fair Trade prices and on numerous purchases by persons employed as shoppers made at various stores in the Washington suburban area at less than Fair Trade prices. (Some of the affidavits of shoppers show that some negotiating was done to obtain such lower prices.) The respondents contend with a good deal of force that it would not have imposed any great burden on the manufacturers to learn of such advertisements and to take policing action based thereon.

There seems to be little doubt that two factors have militated against the most aggressive enforcement of Fair Trade prices in this case. One is the proximity of the Washington suburban area to the District of Columbia which has no Fair Trade Act. The other is the uncertainty relating to the effect of giving trading stamps or the making of similar allowances, which is a bone of contention in other cases now pending and above referred to. (Of the four manufacturers here involved only one, so far as the record shows, has moved to solve this problem by amending its contract.) The giving of trading stamps in some stores was mentioned in *Dart Drug Corp.* v. *Lilly*, *supra*, but that case did not adjudicate the effect thereof. The opinion noted that there had been some question as to whether the giving of trading stamps constituted a violation of Fair Trade contracts, that courts had disagreed on the question, that the parties to that case then conceded that it did constitute a violation, and that the widespread use of these stamps was a comparatively recent development.

The learned trial judge in the present case adopted flatly the view that because of the proximity of the Washington suburban area to the non-Fair Trade area of the District of Columbia the "manufacturers are duty bound to be more alert and aggressive than in other parts of the State

of Maryland." No authority is cited in support of this statement.

A practical view quite at variance with it is expressed in a note entitled *The Operation of Fair Trade Programs*, 69 Harv. L. Rev. 316, in which (at p. 326) the authors state: "In contrast to the comparative ease of enforcement in rural regions, enforcement is practically impossible in areas contiguous to nonfair-trade states or the District of Columbia. Since consumers can readily travel to the non-fair-trade area to make purchases, dealers in the fair-trade area are under pressure to meet the cut prices. In such a situation, rigid enforcement of the fair-trade price would only deprive retailers in the fair-trade area of a great deal of business." We find it difficult to adopt either of the conflicting views dogmatically, though the proximity of a non-Fair Trade area is, we think, a factor to be considered in determining the question of reasonable diligence. For the manufacturer who wishes to enforce Fair Trade prices the proximity of such an area neither excuses throwing in the sponge nor demands the impossible in efforts or results.

The manufacturers whose products are involved in this case were certainly not overzealous in policing prices in the Washington suburban area in Maryland or in bringing suits to maintain their Fair Trade prices for some months prior to the institution of this suit, and they appear to have been well satisfied to let the Gadols take the initiative. Indeed, Mr. Gadol's testimony indicates that the complainants brought this suit themselves because the manufacturers would not bring suit. On the other hand, it is a fair inference from the record that the Gadols have had rather full cooperation from these manufacturers, at least in assembling and presenting the evidence, in this case. It is also true, as pointed out in the above note in 69 Harv. L. Rev. (at p. 343) that a suit by a retailer makes it possible to deal in one case with the Fair Trade products of several

manufacturers. This note also suggests difficulties which might be encountered if one or more manufacturers joined in such a suit. It should also be borne in mind that for over a year before the hearing of this case on the application for a permanent injunction, these respondents, who had been two of the most active price cutters in the area, were under the restraint of the temporary injunction, and that Dart was once fined for contempt for violation thereof while it was in force.

The actual enforcement procedures of the four manufacturers, at least up to the point of bringing suits, although varying somewhat as between themselves, followed much the same pattern as was involved and held sufficient in *Hutzler Bros. Co.* v. *Remington Putnam, supra; Donner* v. *Calvert Distillers Corp.*, 196 Md. 475, 77 A. 2d 305; and in *Dart Drug Corp* v. *Lilly, supra.* In the last case the manufacturer's procedure was thus summarized. "It was shown that Lilly relies largely, in its enforcement program, upon complaints received from local druggists in active competition with an alleged violator, and complaints received from several active druggists' associations. It also instructs its salesmen, of whom there are 18 in the State, to report violations observed. Upon receiving a complaint, it was shown that the practice was to have the district manager or a salesman investigate and talk to the offender. If this is not successful, the manager of the legal department sends a registered letter of warning. If Necessary, this is followed by the institution of suit" (216 Md. at 24).

Similar procedures were also held to show reasonable diligence in such cases in other courts as: *General Electric Co.* v. *Home Utilities Co., supra*; *Eastman Kodak Co.* v. *Home Utilities Co.*, 138 F. Supp. 670 (D.C., Md.), affd. 234 F. 2d 766 (C.A. 4th); *Lionel Corp.* v. *Klein*, 114 A. 2d 652 (Del. Ch.); *General Electric Co.* v. *R. H. Macy & Co.*, 103 N.Y.S. 2d 440, 199 Misc. 87, app. dis. (voluntary order of appellant followed by court order of dismissal as moot)

278 App. Div. 939, 940, 105 N.Y.S. 2d 1003; *General Electric Co.* v. *Klein-on-the-Square, Inc.*, 121 N.Y.S. 2d 37 (N.Y. Sup. Ct.). See also note, 69 Harv. L. Rev., above cited, pp. 335-336. *Contra* to cases above cited, on facts almost identical with those in the *General Electric Co.* v. *Klein-on-the-Square, Inc.*, is *General Electric Co.* v. *Federated Dept. Stores, Inc.*, C.C.H. Trade Reg. Rep. (1955 Trade Cas.) Par. 68098 (E.D., Wis.).

It is settled that a manufacturer need not sue all violators of his Fair Trade prices in order to show reasonable diligence. *Hutzler Bros. Co.* v. *Remington Putnam; Donner* v. *Calvert Distillers Corp.; General Electric Co.* v. *R. H. Macy & Co.;* all above cited.

The evidence, we think, shows that, on the whole, the four manufacturers were successful, both in the general trading area here involved and in the State of Maryland as a whole (cf. *Dart Drug Corp.* v. *Lilly, supra*), in obtaining compliance without resort to litigation in cases in which they received complaints of violations. Their alleged lack of diligence rests largely on their failure to do more to police prices and on their failure to bring suits. We think, however, that the action which we have already outlined, which they did take and its general efficacy in obtaining compliance in cases of reported violations was, in the light of existing circumstances, sufficient to show reasonable diligence in enforcement, notwithstanding the fact that these manufacturers failed to take some action which they well might have taken (such as that, largely by way of intensification, which Johnson & Johnson has in fact taken since the decision of this case by the Circuit Court). Existing doubts as to the effect of giving trading stamps or the like, the pendency of *Dart Drug Corp.* v. *Lilly, supra*, the pendency of other cases which directly involve the question of giving trading stamps and the like, and the pendency of this very case, with its long outstanding temporary injunction, afforded, we think, reasonable grounds for these manufacturers not being more aggressive in enforcement during

the year or more preceding the filing of this suit and during the year and more of its pendency. We conclude that despite their temporary lack of aggressiveness, there was sufficient effort, and successful effort, in accordance with established patterns of enforcement as to negate a waiver or abandonment of Fair Trade prices on their part, or such lack of diligence as would bar relief. In so holding, we assume, and it has not been otherwise contended, that the complainant retailers stand in no better position on the question of reasonable diligence than do the manufacturers.

There is little, if any, dispute with regard to the facts of the case. What constitutes reasonable diligence is, we think, a mixed question of fact and law. We are not unmindful of Rule 886 a of the Maryland Rules, which provides that where a case has been tried by the lower court without a jury, this Court will review the case both upon the law and the evidence, but that the judgment (which includes an order or decree) of the lower court will not be set aside on the evidence unless clearly erroneous, and that due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses. That opportunity is not involved here, since there is no real conflict in the evidence. In this case we think that the Chancellor drew an erroneous legal conclusion from the evidence before him as to what constituted reasonable diligence and that the order of dismissal should therefore be reversed.

The case will, therefore, be remanded for further proceedings and for the entry of a decree not inconsistent with this opinion. Such a decree should provide for the issuance of a permanent injunction. It might also expressly grant to the respondents leave to apply for its dissolution, in whole or in part at any time if the manufacturers, or any of them, should cease to exercise reasonable diligence to enforce their respective Fair Trade prices in the trading area where the respondents and the complainants are in competition. (The rights of the complainant retailers to relief under the Fair Trade Act would not seem to extend

beyond such an area.) In a number of cases injunctions have been granted subject to conditions as to more intensive or extensive enforcement of Fair Trade prices. See *General Electric Co.* v. *R. H. Macy & Co., supra; Colgate-Palmolive Co.* v. *Max Dichter & Sons, Inc.*, 142 F. Supp. 545 (D.C. Mass.); *Fishman* v. *Kaye*, C.C.H. Trade Reg. Rep. (1950-51 Trade Cas.) Par. 62718 (N.J. Super. Ct.); *Seagram-Distillers Corp.* v. *New Cut Rate Liquors, Inc.*, on temporary injunction, 221 F. 2d 815 (C.A., 7th), reversed on permanent injunction for lack of jurisdiction, 245 F. 2d 453 (C.A., 7th).

Order Reversed and Case Remanded for Further Proceedings and the Entry of a Decree Not Inconsistent With This Opinion; Costs to be Paid by the Appellees.

Opinion and Order of the Circuit Court for Montgomery County

(Filed November 12, 1959)

JAMES H. PUGH, *Judge*

This case comes before the Court on the Bill of Complaint of Ellis Gadol and Selma G. Gadol, local druggists doing business in Montgomery County, Maryland, against two other drug stores, Dart Drug Corporation of Maryland and Peoples Service Drug Stores, Inc., under the Fair Trade Act of Maryland, Article 83, Sections 102 through 110 of the 1957 Code of Laws of Maryland. The plaintiffs claim that the defendants have wilfully and knowingly advertised and offered for sale certain drug store merchandise at less than the minimum retail re-sale prices established by contract under the Fair Trade Law of Maryland of four manufacturers, namely, Miles Laboratories, Inc., Bristol Myers Company, Mead Johnson and Johnson & Johnson. Each of these companies have agreements in force in Maryland in which the minimum re-sale prices of their drug store merchandise is established.

These prices vary from time to time, and the manufacturers contend that they send notices to all retailers showing these changes. The plaintiffs are non-signers of these agreements and they bring this suit specifically under that part of Section 107 of Article 83 of the Code which states that violations are "actionable at the suit of any person damaged thereby."

The defendants admit that they have been advertising, offering for sale and selling the items which the plaintiffs allege were offered, advertised and sold below the retail fair trade minimum but the defendants claim, as their defense, that the plaintiffs (who stand in the "shoes" of the manufacturers) have failed to make reasonably diligent effort to enforce their fair trade contracts and therefore such prices have been abandoned. The evidence in this case is very voluminous and it will serve no useful purpose for the Court to incorporate much of it in this opinion.

The rule of law upon which the Court must decide this case is set forth in the case of Hutzler Bros. v. Remington Putnam, 186 Md. 210 at page 216, when the Court of Appeals said: "* * * We hold that a retailer of a copyrighted book cannot take advantage of an alleged breach of a fair trade agreement by others as a defense to a suit against him, unless the violations indicate improper discrimination of unfair business practices, or an acquiesence in the unlawful cutting of prices, or a waiver or abandonment of rights acquired under the statute. In bringing a suit for injunction against a violator of such an agreement, it is sufficient if the complainant has exercised reasonable diligence to prevent price cutting by other violators."

However, in the case of *Dart Drug* v. *Lilly*, 216 Md. 20, the Court of Appeals further said: "* * * The difficulty lies in determining what is reasonable diligence under the circumstances of a particular case." The question of

reasonable diligence is very different in Montgomery and Prince Georges Counties because of the close proximity to the District of Columbia where there is no Fair Trade law. The manufacturers in this case know this, and they are also aware of the fact that there are many discount drug stores in the District of Columbia, just over the Maryland-District Line, all of whom are selling their merchandise far below the prices established by these manufacturers under their Fair Trade contracts in Maryland. Therefore, such manufacturers are duty bound to be more alert and aggressive than in other parts of the State of Maryland. The evidence in this case shows that the manufacturers have been passive and indifferent toward enforcement in this area. (a) The many advertisements and sales by other competitors of the defendants in this area show most emphatically that they do not feel that they are even required to read the advertisements of their merchandise by other druggists in the daily newspapers, which advertisements show continuous violations of their fair trade prices. (b) A witness for one manufacturer admitted that he didn't have time to read the newspapers circulated in the suburbs of Maryland in order to keep up with violations of his company's contracts, further admitting that his company was understaffed. One of the plaintiffs himself testified he became "disgusted" with the enforcement program of these same manufacturers. He also testified that he was always asking the representatives of these manufacturers to take steps to prevent price cutting and after the failure of the manufacturer to stop the price cutting, he filed this suit.

A Court of Equity is a Court of conscience and injunctions are issued by it in clear cases. The continued delays in taking action to prevent price cutting can only lead to one result, the eventual bankruptcy of the independent drug store. The Court does not believe that these four manufacturers have acted with reasonable diligence. If they had, the plaintiffs would not have filed this suit,

they would have done so themselves. The manufacturers are saying that they have acted with "reasonable diligence" because several suits are now pending in the United States District Court in Baltimore and one in the State Court in Baltimore City. In none of these cases has the Court issued an interlocutory injunction, yet the cases have been pending as long as two years and some for three years. This Court is not finding fault with the other Courts nor is it blaming them for the delays in bringing the cases to trial, or the failure of either to issue an interlocutory injunction. Delays can very easily be caused by the litigants, not the Courts, but the fact is that these delays permit the defendants in those cases and others to continue to violate fair trade prices, to the loss, injury and possible bankruptcy of others who are abiding by the prices established by the agreements. This situation is doubly serious and injurious to drug stores in the Metropolitan Area of Montgomery and Prince Georges County, Maryland, because there is no fair trade law in the District of Columbia. Therefore, delays in enforcement with no injunctions issued, defeat the very purpose of the fair trade law, which was enacted to protect, rather than destroy business. There is no evidence in this case that any other non-signer has brought suit or taken any action to prevent price cutting or advertising merchandise below the fair trade minimum, although all non-signers may bring a suit under the Act if damaged thereby. Article 83, Section 107, Code. It is therefore apparent that non-signers have relied upon the manufacturers to compel compliance with their agreements. The non-signers have only themselves to blame if the manufacturers do not "exercise reasonable diligence" to prevent price cutting or advertising below the fair trade minimum. Fair trade laws were intended also to protect manufacturers, in their trade marks and copyrights. If manufacturers desire to protect their trade marks and copyrights, they should act promptly and pursue their rights vigorously. There seems to be a "don't care" at-

titude on the part of these manufacturers and an over anxious tendency to try to avoid litigation, a tendency to "play along" with the violator. This attitude is too passive. In a fast changing world, time for discussion, in the face of a clear violation of fair trade agreements, should be short and action should be prompt and deliberate, otherwise some will take advantage of the delay to the detriment and injury of others. Often prolonged discussions and a desire to compromise on the part of the manufacturer, are taken advantage of, and then after much delay, a law suit is filed. The filing of a law suit is not enough. Such law suits should be prosecuted vigorously, promptly and with as little delay as possible. While these law suits are pending, others are injured. This Court agrees with the principles set forth in the case of *General Electric Co.* v. *Macy*, 103 N.Y.S. (2) 440 when it said at page 452:

> "* * * While this court will not attempt to set forth in detail the requirements of a satisfactory future enforcement program, or a program generally to entitle a plaintiff to the protection of the Fair Trade Law, certain basic essentials are emphasized by the facts of this case. General Electric, as any other manufacturer or producer, should:
>
> (1) Keep itself informed as to price cutting activities and other trends generally known in the industry or trade.
>
> (2) Close scrutiny should be kept over prior violators and appropriate action taken where indicated.
>
> (3) Investigate and follow up complaint *vigorously*.
>
> (4) Enforce Fair Trade prices by *repeated* legal action if necessary.
>
> (5) The enforcement program must be a *continuing* and *sustained* one. * * *" (Emphasis supplied)

An Injunction is an extra-ordinary writ. That means, the Court should not issue it except in extra-ordinary

cases and then only when the evidence is clear and unambiguous. In *Fox* v. *Ewers*, 195 Md. 650, at page 657, the Court of Appeals said: "'Nothing is better settled in this state than that the granting or refusing of an injunction rests in the sound discretion of a Court of Equity.'" Also, as stated in *Miller's Equity Procedure*, Section 574, at page 681:

> "• • • The exercise of the power to grant injunctions—characterized as high and extraordinary—is attended with no small danger, both from its summary nature and its liability to abuse. There is no power, the exercise of which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case, than the power to issue an injunction. It has been repeatedly held that the granting or refusing of a writ of injunction is a matter resting in the sound discretion of the Court. It is not a matter ex debito justitiæ, as the application is addressed to the sound conscience of the court, acting upon all the circumstances belonging to each particular case. It ought not to be granted where it would operate oppressively or unjustly. • • • The power to grant injunctions must be exercised with the greatest caution, and applied only in very clear cases."

Courts are required to construe the Fair Trade Act strictly. In the case of *Venable* v. *Engel & Co.*, 193 Md. 544, at page 549, our Court of Appeals said:

> "• • • The Fair Trade Act is in derogation of the general rule of the common law that any person has the right to sell his property at any price that he and the purchaser may agree upon, and the courts should accordingly construe the Act strictly and should not infer that the Legislature intended to change any common-law principle beyond what the Act explicitly provides. • • •"

The evidence in this case shows a passive, lax and indifferent attitude on the part of the manufacturers to compel compliance with their contracts. It does not prove

reasonable diligence on their part. The plaintiffs acknowledge the deficiency in enforcement by the manufacturers. This Court agrees with the plaintiff.

The Court is convinced that it would be an abuse of the sound discretion required of it to issue a permanent injunction on the evidence in this case.

It is for these reasons that the Court will not issue a permanent injunction.

It is, thereupon, this 10th day of November, A.D. 1959, by the Circuit Court for Montgomery County, Maryland, sitting as a Court of Equity, ORDERED, that the Bill of Complaint be, and the same is hereby dismissed, costs to be paid by the Plaintiffs, and it is further ORDERED, that the interlocutory injunction issued on the 29th day of July, A.D. 1958, be, and the same is hereby dissolved.

APPENDIX B

STATUTES INVOLVED

The Fair Trade Act of Maryland, Article 83 §§ 102-110 of the Code of Laws of Maryland.

§ 103. Contracts relating to resale of commodities at minimum price.

No contract relating to the sale or resale of a commodity which bears, or the label or container which bears, or the vending equipment from which a commodity is sold to consumer bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others, shall be deemed in violation of any law of the State of Maryland by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use at not less than the stipulated minimum price.

§ 104. Actions violating retail price restrictions.

For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of §§ 102-110, (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by § 107 of this subtitle shall be available.

§ *105. Who may establish minimum resale price.*

No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of §§ 102-110, by any person other than the owner of the trade-mark, brand or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name.

§ *106. To what resales contract does not apply.*

No contract containing any of the provisions enumerated in § 103 of this subtitle shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the goods are altered, secondhand, damaged, defaced or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(c) By any officer acting under an order of court.

§ *107. Advertising or selling at less than contract price is unfair competition.*

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of §§ 102-110, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair

competition and is actionable at the suit of any person damaged thereby.

§ 108. To what contracts §§ 102 to 110 inapplicable.

Sections 102-110 shall not apply to any contract or agreement between or among producers or distributors or, except as provided in subdivision (c) of § 103 of this subtitle, between or among wholesalers, or between or among retailers, as to sale or resale prices.

§ 109. Severability.

If any provision of §§ 102-110, or the application thereof to any person or circumstance, is held invalid, the remainder of said sections, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

§ 110. Short title.

Sections 102-110 may be known and cited as the "Fair Trade Act".

Section 5 of the Federal Trade Commission Act, as Amended. Act of July 14, 1952, Chapter 745, 66 Stat. 632 (McGuire Act) 15 U.S.C. § 45.

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when

contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.